

REMARKS

Replacement drawing sheets containing Figures 6A, 6B, 7A, 7B, 7C, 7D, 7E, 8A, 8B, 8C, 9A, 9B, 10A and 10B are enclosed herewith. Figures 7A and 7B have been redrawn to better show the invention. Figures 9A and 9B now show projection lines, as requested by the Examiner. No new matter has been added. The sheet originally containing Figures 6A, 6B, 7A, 7B, 7C, 7D, 7E, 8A, 8B, and 8C has been changed to reflect that Figures 7A and 7B are now on a separate sheet of paper.

By this amendment, claims 1, 3, 4, 7 and 8 have been amended, and new claims 10-16 have been added.

Claim 1 was rejected under 35 U.S.C. §102(b) over Michelson ('914). However, claim 1 has been amended to make it more certain that the opening to be closed off is anterior, and the closure element is a physically separate, rigid gate. This clearly distinguishes over the Michelson device, which includes a posterior gate that must be closed prior to insertion. "The slidable door 134 is then closed prior to implantation." ('914 patent, column 7, line 23.)

Claim 1 was also rejected under 35 U.S.C. §102(b) over Li et al. ('761). While Li does provide an apparatus and method for packing by way an anterior approach, he does not teach or suggest a physically separate rigid gate element. Rather, "the wall element 62 preferably is provided with one or more flap seal members 70 (FIGS. 2 and 18) which close against a distal surface 68 of the proximal connector while wall element 62 as distal end 104 of inner tube 94 is withdrawn from spacer 40." ('761 patent, column 9, lines 48-53.)

Claim 5 stands rejected under 35 U.S.C. §102(b) over Li et al. or, in the alternative, under 35 U.S.C. §103(a) over Li et al. in view of Substad et al. ('728). Given the amendment to claim 1, Applicant argues that obviousness is defeated as well, since even if this combination of references were justified, the invention as now claimed would not result. Furthermore, given that Li resides in an articulating device with hinged members, there is no teaching or suggestion to combine it with the apparatus of Substad et al., which is an entirely different, substantially flexible/compressible construction.

Claim 8 stands rejected under 35 U.S.C. §102(b) over Li et al. or, in the alternative, under 35 U.S.C. §103(a) over Li et al. in view of Ralph et al. ('548). Given that the Examiner concedes that

Li does not teach multiple trapezoidal implants, but argues that it would have been obvious to make a plurality of different sized implants for the Li invention for the same reasons that Ralph does the same. However, this appears to be the Examiner's opinion as opposed to some teaching or suggestion from the prior art. Li only discloses that "the side wall elements 64 may be somewhat wedge-shaped, as shown in FIGS. 1-3, or may be rectangularly-shaped, similar to the wall elements 54 shown in FIG. 6." ('761 patent, column 8, lines 18-21.) However, Li does not disclose a set of implants for different levels. Accordingly, *prima facie* obviousness has not been established.

Claim 9 stands rejected under 35 U.S.C. §102(b) over Li et al. or, in the alternative, under 35 U.S.C. §103(a) over Li et al. in view of Carl et al. ('530). Claim 9 includes a limitation of one or more jigs for fixing the cage in position, including a jig for driving a screw through an upper vertebrae into the cage or through the cage into a lower vertebra. The Examiner concedes that this is not taught by Li, but attempts to combine with Carl et al. to fill the deficiency. Applicant contends that *prima facie* obviousness has not been established. Reference is made to Figure 27 of Li et al., for example, where it is disclosed that spacer 40 may be provided with end portion 72, 74 extending upwardly into one or more both of the vertebrae V_a, V_b. Thus, given that Li et al. has already solved a fixation problem utilizing projections, it is not obvious to combine it with something else that discloses an alternative configuration. Indeed, use of the jig for drive screws into either vertebral body would render the aspect of Li et al. directed to this purpose inoperative, thereby defeating *prima facie* obviousness.

Claims 2-4 stand rejected under 35 U.S.C. §103(a) over Li et al. in view of Chung et al. ('852). The Examiner concedes that Li fails to disclose materials to make the implant, but argues that the teachings of Chung, which make mention of carbon fiber with marks, would render these claims obvious. Applicant respectfully disagrees on the grounds given that the apparatus of Li et al. is an expandable construction, it would be impractical, if not dangerous, to make it would of carbon fiber, given all of the articulations involved. Accordingly, *prima facie* obviousness has not been established.

Based upon the foregoing amendments and comments, Applicant believes all pending claims are in condition for allowance. Questions regarding his application may be directed to the undersigned attorney by telephone, facsimile or electronic mail.

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